INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd.

v.

Romania

(ICSID Case No. ARB/15/31)

PROCEDURAL ORDER No. 34

Members of the Tribunal
Prof. Pierre Tercier, President of the Tribunal
Prof. Horacio A. Grigera Naón, Arbitrator
Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal
Ms. Sara Marzal Yetano

Assistant to the Tribunal
Ms. Maria Athanasiou

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22 October 2020

I. PROCEDURE

1. On 26 August 2016, the Tribunal issued *Procedural Order No. 1* ("PO 1") on the procedure of the present arbitration, together with the Procedural Timetable.

2. On 25 May 2019, Respondent filed its *Rejoinder*, together with factual exhibits, legal authorities, witness statements, expert reports, legal opinions and a "declaration" from Mr. Victor Ponta.

3. On 19 July 2019, Claimants sent a letter to the Tribunal, requesting to (a) exclude from the record testimony that they have no opportunity to confront through cross examination and (b) submit focused rebuttal evidence in response to the new evidence first submitted by Respondent with its Rejoinder ("Application"). A series of letters on Claimants' Application were subsequently exchanged between the Parties on 9, 20 and 27 August 2019.

4. On 6 September 2019, the Tribunal issued *Procedural Order No. 23* ("PO 23"), deciding on Claimants' Application and for a "*limited and focused*" rebuttal phase to take place. In PO 23, the Tribunal envisioned the possibility for "*a further opportunity for rebuttal of these documents, during the Hearing and during post-hearing submission*".

5. On 26 September 2019, Respondent requested the bifurcation of the hearing of December 2019, so as to ensure that the Parties have sufficient time to conduct a proper examination of witnesses and experts ("Respondent's Request for Bifurcating the Hearing").

6. On 30 September 2019, Claimants communicated their response and objection to Respondent's Request for Bifurcating the Hearing. Further correspondence on such Request was exchanged between the Parties on 1 and 8 October 2019.

7. On 15 October 2019, the Tribunal decided in a letter to *bifurcate the hearing* into (a) two weeks as originally scheduled from 2 to 13 December 2019 and (b) one additional week as soon as possible thereafter.

8. On 11 October 2019, Claimants filed their rebuttal documents. Respondent provided its comments thereon on 16 October 2019. Claimants replied to such comments on 18 October 2019.

9. On 22 October 2019, the Tribunal issued *Procedural Order No. 24* ("PO 24"), deciding that Claimants' rebuttal documents were admissible and that Respondent would have "*an equal opportunity (in terms of length) to respond to Claimants' submission*".

10. On 14 November 2019, Respondent filed its sur-rebuttal documents, comprising also witness statements and expert reports. Claimants objected to Respondent's submission on 19 November 2019. Claimants noted that they were prepared to proceed on the basis that Dr. Burrows' third expert report, the supplemental witness statements of Ms. Jeflea and Messrs. Cămărășan, Devian, Golgoţ, and Jurca, and Respondent's proposed rebuttal documents are all accepted into the record. Claimants however objected to the admissibility of new expert report of Dr. Thomas Brady.

11. On 21 November 2019, the Tribunal sent a letter to the Parties, reconsidering its decisions on PO 23 and PO 24 and ordering the Parties to "*resubmit only their rebuttal documents that will be used/discussed during their Opening Statements and in direct or cross examinations"*. The Tribunal admitted Respondent's supplemental witnesses and expert reports in light of Claimants' proposal in their 19 November 2019 letter but rejected the admissibility of the new expert report of Dr. Thomas Brady. The Tribunal again contemplated a discussion with the Parties concerning a possibility to submit additional documents on the rebuttal issues during the phase following the hearing.

12. On 25 November 2019, Claimants resubmitted their rebuttal documents and on 27 November 2019, Respondent resubmitted its sur-rebuttal documents.

13. Between 2 and 13 December 2019, the *first hearing* was held at the premises of the ICSID in Washington DC. During the hearing, the Parties and the Tribunal discussed the possibility for a further submission of rebuttal documents (Tr. 02.12.2019, 26:15-20, Tr. 13.12.2020, 3308:11-20).

14. On 17 December 2019, the Tribunal sent a letter to the Parties, inviting them, if they wished, to file rebuttal documents "*in the form of a simultaneous filing not exceeding fifty pages for each Party*".

15. On 10 March 2020, the Tribunal issued *Procedural Order No. 27* ("PO 27") deciding on the list of questions that it invited the Parties to reply. One of the questions that the Tribunal had asked the Parties to address was the following:

> *(b) Did Claimants' alleged losses occur (or begin to occur) at the same point in time that the breach is said to have been consummated in respect of each claim? Should Claimants' alleged losses be quantified on the date upon which each breach is alleged to have occurred? If not, is the point in time when Claimants' alleged losses occurred relevant to establishing liability for a breach in respect of each claim?*

16. On 10 April 2020, the Parties simultaneously filed their rebuttal documents.

17. On 13 April 2020, each Party requested leave to comment on the other Party's rebuttal document submission of 10 April 2020. The Tribunal granted the Parties leave to comment. The Parties filed their comments to the other Party's rebuttal document submission on 24 April 2020. With its comments, Respondent filed a nine-page Annex commenting on each of Claimants' rebuttal documents.

18. Also on 24 April 2020, Claimants sent an email, objecting to Respondent's nine-page "unauthorized Annex" to their letter submitting further comments on Claimants' list of rebuttal documents and respectfully requesting that such Annex be disregarded.

19. On 25 April 2020, Respondent sent an email, noting that Claimants are in direct breach of the Tribunal's direction that "[t]*here shall be no further correspondence on the issue*" and that Respondent has complied with the Tribunal's directions.

20. On 28 April 2020, the Tribunal issued *Procedural Order No. 30* ("PO 30"), deciding, *inter alia*, that Claimants' rebuttal documents and Respondent's rebuttal documents filed on 10 April 2020 were inadmissible and that the Parties should resubmit their further rebuttal documents in the manner proposed by the Tribunal.

21. On 29 April 2020, Claimants requested that the Tribunal "*confirm that PO 30 is not intended to, and does not, replace or limit its earlier decisions to allow rebuttal direct testimony, as at the December hearing, for the witnesses and experts scheduled to testify at the upcoming September hearing for whom Claimants already have provided notice*" ("Claimants' request for confirmation").

22. On the same date, Respondent applied for the Tribunal to reconsider certain decisions in PO 30 ("Respondent's Application for Reconsideration of PO 30").

23. On 30 April 2020, the Tribunal sent a letter to the Parties, acknowledging receipt of Claimants' letter of 29 April 2020, and noting that it would revert on Claimants' request for confirmation shortly. The Tribunal also acknowledged receipt of Respondent's Application for Reconsideration of PO 30 and invited Claimants to submit their comments, if any.

24. In light of the Parties' disagreements on, *inter alia*, the schedule, the rebuttal documents and the tight schedule leading up to the September Hearing, the Tribunal sent a letter to the Parties on 5 May 2020, inviting them to confer and to agree both the form and scope of the "rebuttal phase" addressing the December 2019 and the September 2020 issues.

25. On 11 May 2020, Claimants filed their responses to the Tribunal's questions set out in PO 27, together with legal authorities.

26. On 18 May 2020, Claimants sent a message to the Tribunal, informing it that the Parties had agreed on the schedule and the rebuttal documents and communicating the text of the agreement. Respondent confirmed the Parties' agreement set out in Claimants' message on the same date.

27. On 19 May 2020, the Tribunal took note of the Parties' agreement of 18 May 2020 and stated that its decision in PO 30, concerning the admissibility of the Parties' rebuttal documents was no longer pertinent and that Claimants' request for a confirmation in relation to the Tribunal's decision in PO 30 and Respondent's Application for Reconsideration of PO 30, both dated 29 April 2020, were now moot.

28. On 20 May 2020, Respondent asked "*the Tribunal* [to] *re-issue its communication of 19 May 2020 in the form of a procedural order that would also be subsequently published on the ICSID website.*"

29. The Tribunal agreed with the joint proposal made by the Parties and integrated it in *Procedural Order No. 32* ("PO 32") on 26 May 2020.

30. On 18 September 2020, the Tribunal issued *Procedural Order No. 33* ("PO 33"), the Protocol governing the upcoming Virtual Hearing.

31. Between 28 September 2020 and 4 October 2020, a *Virtual Hearing* on technical and quantum aspects of the case took place. On the first day of the hearing, Respondent objected to Claimants' Slides 56 and 57 of volume 4, arguing that Claimants are presenting new claims. (Tr. 28.09.2020, 145:6-147:3; see also Claimants' response: Tr. 28.09.2020, 148:19-149:08).

The Tribunal gave both Parties an opportunity to address the issue in writing. Specifically:

- Claimants elaborated on Slides 56 and 57 of volume 4 of their Opening in light of Respondent's objection in a letter dated 30 September 2020.
- Respondent submitted its comments to Claimants' letter and objection on 1 October 2020.
- Claimants submitted their reply to Respondent's letter on 2 October 2020.
- Respondent filed its comments to Claimants' reply 4 October 2020.
- Claimants filed their further comments' to Respondent's comments on 7 October 2020.

II. THE PARTIES' POSITIONS

A. Respondent

1. Letter dated 1 October 2020

32. During their Opening Statement, Claimants for the first time requested that the Tribunal award them an amount (i) different from that claimed in the Prayer for Relief set out in their Memorial and Reply and (ii) calculated by reference to a different valuation date: 6 September 2013. Claimants specifically requested that the Tribunal grant their new claim in the event the Tribunal rejects the Claimants' only claim to date, which is based on the valuation date of 29 July 2011.

33. In their demonstrative exhibits Nos. 8 and 9, Claimants quantified the alternative amounts the Tribunal should grant, based on various alternative indices, in the event it preferred the valuation date of 6 September 2013 (as the date of breach is now alleged to be on or around 9 September 2013) and not 29 July 2011.

34. At the December 2019 hearing, Claimants explained that it was not necessary or relevant to identify the date of breach. In response to the Tribunal's written questions in PO 27, Claimants introduced an alleged date of breach of "*on or about September 9, 2013*", all the while maintaining the valuation date of 29 July 2011.

35. Claimants' new claim, in the alternative, for compensation, based on an entirely new date of 6 September 2013 is a new claim within the meaning or Article 40(2) of the ICSID Arbitration Rules.

36. Specifically:

- The only "measure of value" in dispute in this arbitration is Claimants' claim for compensation based on the valuation date of 29 July 2011. Claimants could have made, but did not make, an alternative claim for compensation.

- Any new evidence cannot justify the introduction of a new claim at this stage of the proceedings.

- While allowing Respondent to comment on the new claim at this hearing is necessary, it is not a substitute for a full opportunity to respond to it in writing and, if necessary, by way of expert evidence and a further hearing.

37. Allowing at this late stage of the proceedings would cause fundamental prejudice to the Respondent and amount to a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention.

38. Therefore, Claimants' new claim should be declared as inadmissible.

2. Letter dated 4 October 2020

39. Respondent maintains its request that the Tribunal declare the new claim inadmissible. Specifically:

- Claimants are requesting that, if the Tribunal does not award them the over USD 3.2 billion claimed in the prayer for relief in their written pleadings, it should, in the alternative, award them one of four sums which they mentioned for the first time during their Opening Statement and ranging between USD 706 million and USD 1.2 billion. This is not new argument. New argument would be further reasons why the Tribunal should award the Claimants USD 3.2 billion. These are new, alternative requests for relief. Further, this is not new evidence. New evidence would be further witness testimony or documents offered in support of their request for over USD 3.2 billion.

- A new claim cannot be justified on the grounds that it responds to new evidence or argument in a rejoinder. Respondent had notice that Claimants would describe certain limited rebuttal evidence during this second hearing, not that they would introduce the new claim. Furthermore, the Tribunal's allowance of limited rebuttal evidence did not extend to allowance of new claims.

- Claimants confuse a party's right to comment on a new argument and its right to respond to a claim, i.e. its right to present a defense, which entails its right to present expert and other evidence.

- The Tribunal cannot make an award based on a different Valuation Date when there is no argument or evidence from either Party as to what the market knew about the Project at that time. Respondent has not had the opportunity to present argument and evidence regarding a Valuation Date of 6 September 2013. Were the new claim allowed, Respondent would need to present argument and evidence, including documentary and oral as well as expert and fact witness

evidence as to what the market knew and did not know about the Project as at 6 September 2013.

– The case law is well settled that an ICSID tribunal cannot award a claimant something that it did not request in its prayer for relief, as that would amount to a serious departure from a fundamental rule of procedure. The authorities that Claimants invoke, all confirm that investment tribunals have no authority to award compensation applying valuation dates different from those advocated by the parties.

B. Claimants

1. Letter dated 30 September 2020

40. There is no new claim but an argument made in response to evidence that Respondent first presented in its Rejoinder. In particular:

– In the Rejoinder round, Dr. Burrows presented arguments about Gabriel Canada's market capitalization and the market capitalization implied by indexing to the end of 2013 with reference to gold sector market indices.

– With their letter of 25 November 2019, Claimants identified as a rebuttal subject "*Developments subsequent to the valuation date in Gabriel Canada's stock market capitalization in light of the evolution of indexes of gold company stocks, in response to the Rejoinder report of Dr. Burrows*" and produced several rebuttal documents relating to that subject. With their letter of 10 April 2020, Claimants submitted several further updates of those documents.

– The rebuttal arguments that Claimants presented on that subject on 28 September 2020 in their Opening also took account of the questions directed to the Parties by the Tribunal in PO 27, which included in ¶9(b) questions regarding the date as of when losses should be quantified.

– While Claimants quantified their request for compensation in their Request for Relief, Claimants also requested more broadly that the Tribunal "*Award Claimants compensation on such other basis as the Tribunal may deem warranted.*"

41. Thus, Claimants have elaborated arguments in response to evidence presented by Respondent's quantum expert only in the Rejoinder in accordance with the rebuttal procedure.

42. Therefore, the temporal limitations set forth in ICSID Arbitration Rule 40 do not apply to new arguments on issues that fall squarely within the scope of the dispute already before the tribunal.

43. Respondent's additional characterization of Claimants' argument as a new valuation is incorrect.

44. There is no prejudice to Respondent, as it is open to Respondent to present argument as to whether it considers the analysis at issue relevant to a measure of loss incurred as a result Romania's wrongful conduct, during this hearing and in post hearing briefs.

2. Letter dated 2 October 2020

45. Respondent fails to carry its burden to demonstrate that the arguments presented constitute a new claim and therefore fails to demonstrate that the temporal conditions relating to "new claims" apply.

46. Assuming the Tribunal concludes that liability is so established, the Tribunal will have to evaluate what the evidence shows about how to measure the value of the Project Rights that have been lost. While Claimants submit that the Tribunal should accept the evidence and argument that Claimants have presented, the Tribunal has discretion in that regard and is not bound to accept the formulations presented by the Parties, as numerous authorities confirm.

47. Respondent has had notice Claimants would provide rebuttal on this issue for over a year. Dr. Burrows may address the issue in rebuttal and Respondent will have further opportunity to address the issue in post hearing briefs.

3. Letter dated 3 October 2020

48. In response to Respondent's evidence and in view of the Tribunal's questions posed to the Parties in PO 27, Claimants repeated their argument that compensation should be based on the value of the Project Rights as of 29 July 2011, but that if the Tribunal were to consider that compensation should be based on a measure assessed as of a later date, the measure cannot be based on actual market values during 2012 and 2013 because those values were polluted by Romania's wrongful conduct, and that the indexing approach suggested by Dr. Burrows' second report is, among other things, incomplete.

49. The argument about how to measure the loss of the Project Rights and what record evidence is relevant to that assessment is not an incidental or additional claim. Claimants' claim for compensation in the amount of the value of the Project Rights lost due to Romania's treaty breaches is not changed. Various arguments as to what the record evidence shows regarding how the loss of those rights should be valued do not constitute additional claims. Thus, there is no basis to refer to ICSID Convention Article 46 or ICSID Arbitration Rule 40.

50. There is significant authority supporting the principle that investment tribunals have broad discretion when assessing the evidence of damage and to award compensation in amounts and based on measures different from those advocated by the parties.

51. Respondent has had the opportunity to address and has addressed the argument presented, and will have two rounds of post hearing briefs to address the issue further. Thus, even if the Tribunal were to consider the argument presented as an incidental or additional claim, which it should not, the Tribunal may authorize its presentation. Doing so would be necessary in this case as the argument presented follows from evidence and argument first presented in Respondent's Rejoinder and from post-hearing questions presented by the Tribunal.

III. THE TRIBUNAL'S ANALYSIS

A. Issue

52. The *issue* is whether a "new claim" was introduced by Claimants during the virtual hearing of 28 September to 4 October 2020. Depending on the answer, the Tribunal will set out the next steps.

B. Admissibility

53. The rule referred to by Respondent in support of its "new claim" objection is Rule 40 of the ICSID Arbitration Rules on "Ancillary Claims". Rule 40 provides the following:

> *(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.*
>
> *(2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal upon justification by the party presenting the ancillary claim and upon considering any objection of the other party authorizes the presentation of the claim at a later stage in the proceeding.*
>
> *(3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.*

54. Further, pursuant to Article 46 of the ICSID Convention,

> [e]*xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.*

55. It is clear from the aforementioned rules, that an incidental or additional claim may be presented no later than the reply, unless the parties otherwise agree, or else it will be inadmissible. Further, a tribunal may nevertheless authorize such claim's presentation at a later stage of the proceedings if it deems it justified and after having heard the other party.

56. Relevant commentary to these rules, also quoted or cited by Respondent, describes an incidental or additional claim as follows:

> "*One may surmise than an incidental claim is one that arises as a consequence of the primary claim, such as a claim for interest or procedural costs. An additional claim may be seen to be one that is put forward by way of a later amendment to the original pleading.* […] *No legal consequences are attached to a distinction between incidental or additional claims.* […] *Incidental or additional claims can be of a varied nature. Recurrent instances of incidental or additional claims are third party contracts, interest or the sums claimed and procedural costs*" (see C. Schreuer *et al.*, *The ICSID Convention: A Commentary* (2nd edition, Cambridge University Press, 2009), pp 740-741, paras 33-35).
>
> "*An additional claim is normally presented as a new claim that supplements the original claims (thereby amending the body of claims originally formulated by the Claimant)*" (see J. Fouret, R. Gerbay, G. Alvarez (eds.), *The ICSID Convention, Rules and Regulations – A Practical Commentary*, Cheltenham, 2019, p. 1168 (para. 25.110).
>
> "[A]*n additional claim is an augmentation of the original pleading to include a new cause of action or request for relief*" (D. Kalderimis, B. Love, "ICSID Arbitration Rules, Chapter IV, Section 3, Arbitration Rule 46", in L. A. Mistelis (ed.), *Concise International Arbitration*, (2nd edition, Kluwer Law International), p. 120).

57. With the aforementioned in mind, and having thoroughly examined the Parties' positions, the Tribunal considers the following.

58. In the present case, Claimants made during the virtual hearing certain assertions concerning Gabriel Canada's market capitalization on 6 September 2013 for purposes of measuring possible loss. While these assertions might be characterized as alternative submissions in the event the Tribunal decides to assess damages on a different date than that set out in their Request for Relief (see, for example, Tr. 28.10.2020, 105:5-12), they cannot be characterized either as claiming additional sums, or as supplementing the claim in relation to the July 2011 date or as adding a new request for relief. Instead, Claimants engaged in a discussion of a reduction of the amount claimed, while repeating their case that compensation should be based on the value of the Project Rights as of 29 July 2011, as reflected in their Request for Relief set out in their Memorial and Reply (see, for example, Tr. 28.10.2020, 105:5-12; Claimants' Opening Presentation Slides 55-58 (vol. 4); Memorial, para. 931(c)(i) and Reply, para. 749(c)(i) "[a]*ward Claimants compensation in the total amount of US$ 3,285,656,649 plus interest compounded annually running from July 29, 2011 up though the date of payment of the Award so established at the rate of 12-month LIBOR + 4%*.").

59. Accordingly, the Tribunal does not consider that Claimants' assertions comprise a new claim in the sense that such assertions constitute an additional or incidental claim within the scope of Rule 40 of the ICSID Arbitration Rules and Article 46 of the ICSID Convention. At this juncture, the Tribunal emphasizes that reducing damages is an exercise that the Tribunal has the authority to undertake in any event when considering, if at all, the relevant request for relief (i.e., Memorial, para. 931(c)(i) and Reply, para. 749(c)(i)) and certainly only after having received all relevant information from both Parties, in adhering to the principle of due process. More specifically, the Tribunal does

have the discretion to reassess the valuation date for damages provided that it is all the necessary information at its disposal. In this connection, it agrees with Respondent that the Tribunal cannot adopt a different valuation date without first affording the Parties a full opportunity to present their positions on the relevant aspects of that date.

60. The Tribunal's reasoning is independent of Claimants' assertions as to whether its new arguments may or may not have been the result of the rebuttal phase and/or the Tribunal's questions in PO 27, as well as unrelated to Claimants' request for relief that the Tribunal should "[a]*ward Claimants compensation on such other basis as the Tribunal may deem warranted*" (see Memorial, para. 931(c)(ii) and Reply, para. 749(c)(ii)).

61. The Tribunal finds therefore that Claimants' new arguments concerning a valuation date of 6 September 2013 are admissible.

C. Next steps

62. The Tribunal recalls that, whereas Claimants argued that Respondent could react to the substance of Claimants' assertions during the virtual hearing and in post hearing briefs, Respondent argued that this is "*not a substitute for a full opportunity to respond to it in writing and, if necessary, by way of expert evidence and a further hearing*". The Tribunal also recalls, from its reasoning above, that it would be bound to hear from both Parties in the event that it were to entertain a different valuation date (see above para. 59).

63. In light of this exceptional situation, the Tribunal strongly invites the Parties to liaise and agree, if possible, on the next steps. Specifically, should the Parties address Claimants' new arguments concerning a valuation date of 6 September 2013:

- In the Parties' upcoming Post-Hearing Briefs? or
- In a parallel written procedure? or
- Only if and after the Tribunal has rendered a decision on jurisdiction and liability and were minded to entertain a different valuation date?

64. The Parties shall do so **by 30 October 2020**. Absent any agreement from the Parties, the Tribunal shall decide.

III. ORDER

1. ***Claimants' new arguments concerning the valuation date of 6 September 2013 are admissible.***

2. ***The Tribunal strongly invites the Parties to liaise and agree, if possible, on the next steps as described in paragraphs 63 and 64 above.***

On behalf of the Tribunal,

[signed]

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Prof. Pierre Tercier
President of the Tribunal